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Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID P. FJELLINE, et al.,
Petitioners,

versus

JOHN N. GRECO, et al.,
Respondents.

On Petition for Writ of Certiorari to Court of Appeal of the State of California Third Appellate District

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PETITION FOR WRIT OF CERTIORARI

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39 pp

QUESTIONS PRESENTED

1. Whether the state court violates the Supremacy clause by repeatedly instructing the jury that a farmer does not have the "right"[1] to pursue United States Department of Agriculture administrative remedies.

2 What Constitutional tort immunities protect the common man against being sued for "speech" in everyday administrative and court dispute resolution proceedings?

Is waiver of these tort immunities valid when the Slip Opinion misquotes the appellate record, leaving out words of objection?

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[1] See page 6-7 of this Petition for the quote mandating that Petitioners had no "right" to use USDA remedies.

THE PARTIES

The following are all the parties to this Petition: (1) Petitioners: David P. Fjelline, Teresa Reed Fjelline, Guy W. Foster and Linda Foster (sometimes herein "Petitioners"); (2) Respondents: John N. Greco and Mary Lorraine Greco (sometimes herein "Respondents").

No party to this Petition for Writ of Certiorari is a corporation.

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PETITION FOR WRIT OF CERTIORARI

The prayer of this Petition is to save a small-family farm, which is about to be taken from two hard-working men who spent their life savings to buy the farm. The reason - Petitioners used USDA administrative and court remedies, which Respondents claimed caused them mental suffering. Petitioners pray that a writ of certiorari issue to review the Opinion of the California Court of Appeal Third Appellate District.

OPINIONS BELOW

The opinion of the California Court of Appeal California ("Slip Opinion") was unreported and is reprinted as Appendix A. Notice of United States Department of Agriculture *in dispute* Decision is reprinted at Appendix B (p. 30A). Appendices are separately bound.

Under California Rule of Court, Rule 29(b)(2) and 27 Petitioners requested rehearing for the purpose of preserving important facts and arguments (briefed but not recorded in the Slip Opinion) for later appeal. Petitions for Rehearing are reprinted at Appendix F (p. 36A). Respondents disputed no fact or argument raised in the Petitions for Rehearing. Petitions for Rehearing denied without a hearing.

JURISDICTION

The California Court of Appeal Slip Opinion was filed May 8, 2002. The California Supreme Court denied review on July 24, 2002. On October 9, 2002, Justice O'Connor granted petitioners an extension until *November 21, 2002*, to file this petition. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment of the United States Constitution "Congress shall make no law . . . abridging the freedom of speech . . . and to petition the Government for redress of grievance" clause, the Fourteenth Amendment "Due Process" clause, and Article VI of the United States Constitution the "Supremacy" clause are involved and are reprinted at Appendix J, p. 121A.

The applicable provisions of the Code of Federal Regulations and United States Department of Agriculture *Management Directives*, FAS 1 PF Amend. 252, which control farm subsidy division between farmland owner and renter are involved and are reprinted at Appendix J, p. 122A-126A.

STATEMENT OF CASE

A. Farmland Lease Dispute Leads Petitioners to Seek USDA Administrative Remedy

In the beginning, this case involved a farmland lease dispute between Petitioners, as farmland owner, and Respondents, as renter. The dispute is uneventful until it ended up at the steps of the USDA office and the courthouse.[2] Yet, a little understanding of the parties' dispute is necessary.

Respondents are in the business of renting several rice farms. They rented Petitioners' newly-purchased rice farm. The only rent income under the lease is 10% of the "*gross proceeds of crop.*" Appendix ("App.") 2A-4A. The parties' dispute involves the division of USDA farm subsidies, which were not mentioned in the lease. Under

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[2] The Slip Opinion finds liability on "litigation" only, holding the non-attorneys liable by ratification of "litigation" procedures. App. 28A

the 1996 Farm Bill, farm subsidies are paid, without reduction in amount, whether a crop is grown or not.[3] Because Petitioners' rent income is based on crop production, Petitioners want all the acres planted. Respondents intends to plant only half the acres but to collect farm subsidies on all the acres. App. 3A.

Petitioners asked: Doesn't the implied covenant under a crop share lease require that the farm renter plant all possible acres in order to maximize income? How can Respondents collect subsidies when he grows no crop on half of the land, leaving Petitioners with no "gross proceeds of crop" on which to compute rent?

When no crop is grown, Petitioners receive only about 20%[4] of the rent they receive if Respondents grow a crop. This occurs because "*gross* proceeds of crop" vanishes and only farm subsidies (a much small number) exist. But, Respondents are actually rewarded when they do no work.[5] Upon these fact the dispute arose.

B. Petitioners Win USDA Administrative "In Dispute" Petition

Petitioners brought their dispute to the experts -- the United States Department of Agriculture Farm Service Agency ("FSA"), which distributes farm subsidies. App. 5A-6A.

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[3] 7 USC § 7218; 7 CFR § 1412.303(b)(1); 7 CFR § 1412.206; 7 CFR § 1412.103; 7 CFR 1412.401(c).

[4] Figures in the Slip Opinion provide all necessary numbers here. The gross proceeds = $660 per acre expenses x 97.3 acres = $64,218, add back $742 loss, + USDA farm subsidy $16,400 = $81,322. When no crop is grown, rent is based on farm subsidies only $16,480; when a crop is grown, rent is based on $81,332. (App.16A, 2A.)
$16,400/$81,322 = 20%.

[5] Respondents expected loss of $742 on actual crop production shows he actually makes more doing no work at all. App. 16A.

A USDA Program Specialist heard about Petitioners' dispute and recommended that Petitioners petition the USDA to put the farm subsidies "in dispute."[6] Petitioners followed the Program Specialist's suggestion. App 5A-6A. As required under USDA law, the USDA studied the lease, past subsidy splits on the farm, and other "*available evidence.*" App. 124A-126A. The USDA rendered its Decision that Petitioners had a "*valid dispute.*" The USDA based their decision on the absence of an agreement on farm subsidy division in the lease. Petitioners won their "in dispute" petition, causing the USDA to temporarily withhold farm subsidy payments.[7] App 5A-6A, 30A, 104A Respondents' remedy was to appeal to the Washington D.C. USDA office. They filed no appeal. App. 104A.

As well, Respondent John Greco did not work the ground nor grow a crop. He barely even placed his foot upon Petitioners' farmland during the course of the lease. App. 7A, 98A-99A.

C. State Court Proceedings

Petitioners requested declaratory relief on the lease in state court (SCV 6972). In response, a flurry of cross-actions flew. Respondents' attorney filed a cross-complaint for: (1) breach of contract, (2) defamation and (3) mental suffering. Petitioners countered by amending their declaratory relief complaint to include constructive fraud. As well, they sought a speedy remedy to get their farmland back, by filing a separate unlawful detainer action. App. 6A-7A. The unlawful detainer action ended with the Court deferring its decision to to the main action SCV 6972. App. 33A-34A.

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[6] 1 PF Amend. 11, ¶252,. (Further criteria are requires for payment of farm subsidies, but they are irrelevant here.)

[7] The first half had been paid out prior to the "in dispute" petition.

(1) Contract Trial

Respondents' breach of contract portion of the case was tried by court. The trial court found Respondents' contention on water availability moot. The trial court did not respond to Petitioners' assertions that federal law was violated and that Respondents failed to exhaust USDA appeal procedures. *infra* 16-17 ("Federal Issues Raised")

The trial court ordered that Petitioners breached the farm lease by using the United States Department of Agriculture "in dispute" petition to stop the farm subsidy payment. Petitioners were thus punished in breach of contract for using USDA administrative procedures. App. 9A; 3A.

(2) Mental Suffering Jury Trial

A Mental Suffering Trial Based on USDA Administrative "Petitioning"[8]

Respondents' cross-action for defamation was dismissed as meritless. App. 7A. Respondents' cross-action for mental suffering was tried by jury. The jury determined no cause, nor were they present for any cause, except Respondents' mental suffering cross-claim. App. 9A.

Minutes into the trial, with the jury's minds still fresh with anticipation, the jury heard the following order from the Court about the law and Petitioner's use of the USDA petitioning procedure:

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[8] The First Amendment's petition for grievance clause is referred to herein as the "petition" or "petition for grievance" clause.

"PETITIONER'S COUNSEL: [T]hey had a right to put the [farm subsidy] shares in dispute?

RESPONDENT:[9] They had a right to. . . .

"THE COURT: Wait a minute. Just a moment. I don't want the jury confused on this issue. I have previously ruled that they didn't have a right to contest those funds coming from the county.[8] That's my ruling. That's what that is; that they did not have the right to contest the award of the distribution of those monies from the county agricultural office.[10]

MR. McALPIN: May we approach for a moment, Your Honor? . . .

THE COURT: No. That's what the ruling was. *That's the law. That's the law of this case.* Do they have the power to do it? Yes, they had the power. Were there procedures in effect for them do it? Yes. Were they correct in doing it? *Did they have the right to do it? No, they did not.* To make sure -- I want to make sure you're not confused on that issue. Thank you." (italics added) Reporter's Transcript ("RT") 670-671.

(The above was quoted in briefing and raised again on summarily-denied Request for Rehearing. App. 102A)

The Court gave no explanation of its statement "That's the law. That's the law of this case." The Court did not explain why it was so important that the jury

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[9] Respondent John Greco, testifying here, was a member of the governing board of the local FSA office, the "County Committee."

[10] As there never was any evidence of "monies from the county agricultural office," it was clear the Court was speaking of United States Department of Agriculture farm subsidies.

know that Petitioners had no "right" to use the USDA remedies.

During the trial, Respondents' counsel argued Petitioners' win of USDA "in dispute" procedure was loathsome conduct and an "extreme and outrageous act" such as is required under a mental suffering case.

In opening statements, Respondents counsel argued to the jury:

> "*they go to the ASCS*[11] *office in Placer County in Auburn and they say: Don't make the agricultural subsidy payment because it's in dispute.* But . . .they were all taken not related to the question of the validity of the lease, *they were taken, we think, with the intent and for the purposes of creating mental distress.*" RT 551-552.

And he argued:

> "*They froze that* [subsidy payment]. The effect of that was that Mr. Greco couldn't farm the property. Then in April to *heighten the mental distress . . .*" (italics added) RT 552. App. 50A.

Petitioners were interrogated at length in this jury trial about using USDA administrative procedures and repeatedly asked if they did not undertake these procedures to inflict emotional distress on Respondents. 758, 604-610; 712; 724; 752. Mr. Greco was asked, at the IIED trial, questions about the USDA hearing. CR 605. The cross-claim alleged the USDA "in dispute" procedure caused emotional distress. App. 50A, 103A.

In closing arguments at the mental suffering trial, Respondents' counsel argued that the USDA "in dispute" administrative procedure caused Respondent emotional distress. Respondents' counsel argued:

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[11] ASCS is the former name for USDA Farm Service Agency.

> "When that didn't work, *they tried to stop the [subsidy] payment, and did.* . . . Now, that is a factual circumstance *consistent with . . . an intent to impose mental suffering* to get their objects." RT 1088-89). App. 50A.

The Court instructed the jury multiple times that Petitioners had no "right" use the USDA "in dispute" remedy. RT 671, line 3-4; 671, line 6-8; 671, line 17-18; RT 918, line 16-17, RT 918, line 19. App. 10A, 102A. The court instructed twice that the USDA remedy could be used to show "intent," when no "intent" was relevant except "intent to inflict emotional distress." RT at 943, 918. App. 105A. Most damagingly, the state court instructed Petitioners did not have the right to use USDA remedies and "that's the law, that's the law of this case". . . . "I want to make sure you're not confused on that issue." *Supra* 6.

The Slip Opinion did not document these briefed issues and quotes. The issues were preserved by Petition for Rehearing under California Rule of Court, Rule 29(b)(2) and 27.

A Mental Suffering Trial Based on Court Proceedings

Respondent John N. Greco testified first at this mental suffering trial. Within minutes, his testimony turned to Petitioners' attorney letter stating the declaratory relief action was imminent (declaratory relief filed 8 days later). Over "litigation privilege" objection, John Greco testified that the following statement in the letter caused him emotional distress: "[we] believe that you used that knowledge to take advantage of our

predecessor, Mrs. Surmon,[12] an 83 year old widow." RT 598; 600-601. App. 72A-73A, 110A.

Next the trial turned to a letter from Petitioners' counsel to Respondents' counsel (and no one else). The letter notified Respondents' counsel of a proposed amendment (which was in fact amended). RT 601. App. 74A-75A, 113A. Over second "litigation privilege" objection, John Greco testified:

> Q So *what do you feel in your chest*?
>
> A I'm not sleeping. I'm having heart pains. . . . I got guys knocking on my door handing me subpoenas, depositions, all kind -- I don't even know what they were." (italics added) RT 610-611. App. 74A-75A.

Respondents next offer the unlawful-detainer, 3-day notice into evidence. Petitioners lodge another "litigation privilege" objection, but again the trial court overrules the objection. The required legal notice is admitted with an instruction that it can show "an overall plan" to inflict emotional distress. RT 610. App. 75A, 101A, 115A.

Respondent next sought to introduce the "results of" the actual unlawful detainer action. App. 75A. (The results of this action was that the decision was abated to SCV 6972. App. 33A, 7A.) Petitioners lodge another "litigation privilege" objection, but yet again the trial court overrules the objection. The Court admitted the "results of the actual unlawful detainer action" to show an "intention of committing or inflicting emotional distress as part of an *overall plan*." RT 614. (italics added). RT 614. App. 75A.

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[12] Petitioners inherited the lease with the sale of the land from Surmon to Petitioners (footnote not in original text).

After these overruled objections, the jury heard Mr. Greco's testimony:

> A My wife and I went to bed . . -- I woke up. . . . I kind of couldn't breathe . . . it kept getting harder and harder to breathe. I was thinking about what these people were trying to do to me and my family. So I got up and I thought: I can't breathe, and I started having a chest pain. Nothing, you know. . . . Things got worse. I got tighter and tighter and tighter. My chest was like pounding and I felt it was filling up from the inside out like blowing up, kind of just like blowing up." RT 617. App. 75-76.

And the jury heard that *what was causing* Mr. Greco stress:

John Greco: *"The fear of being sued."* RT 625. App. 76A.

During the proceedings, Respondent John Greco testified that legal mumbo jumbo, subpoenas, and different legal proceedings caused him distress. (RT 412, 598, 600, 601, 610, 619, 624, 638, 677-78, 688). He complained in detail of being served with legal process and "handing me . . depositions." And next stated "so I felt like I was being stalked" about the legal proceedings. RT 610. App. 77A.

His wife, Mary Lorraine Greco, testified that she was stressed about the litigation. (RT 800, 801). She was anxious about going to the post office because there might be more legal papers. (RT 802). She conceded that the Grecos had in turn threatened all of the Petitioners' assets (RT 811), but she did not think the legal system was set up for that *"form of negotiation."* Answering interrogatories caused her stress. (RT 810, 816). Her major complaint

was she had to live with the lawsuit every day. RT 817. App. 77A.

Respondents' counsel interrogated Linda Foster about steps she took as counsel for the cross-defendants. He asked her what her purpose in filing the action. (RT 720) He asked her about the attorney demand letter (Ex. C) and a letter between the attorneys in a lawsuit (Ex. S), which were inadmissible to show liability but admitted over objection. RT 694-702; RT 743-46. He questioned her about the allegations of the complaint, Ex. E (RT 703, 707-08, 714-16; Ex. U (RT 704-07, 719-22, 747). She was asked "so really was the lawsuit . . . designed to drive the Grecos into a settlement of this." RT 706. Question after question asked whether the litigation was instituted for the purpose of "hammering" the Grecos into submission. (RT 717). App. 77A.

All this evidence was admitted though malicious prosecution was never plead, never proven, nor was malicious prosecution ripe for pleading. The lay jury thus gave away the life savings of two hard-working men in the form of a farm ($250,000) in tort and punitive damages because Petitioners used USDA federal administrative remedies and the courts in an attempt to resolve a dispute.

The Slip Opinion did not document these briefed issues and quotes. The issues were preserved by Petition for Rehearing under California Rule of Court, Rule 29(b)(2) and 27.

D. Petitioners' Efforts to Protect Their Constitutional Right to be Free of a Lawsuit Based on "Petitioning" Activity

In limine, Petitioners' asked the court to hear the evidence prior to trial and exclude evidence from the jury's consideration, which might subject Petitioners to damages based on their use of judicial and administrative procedures. App. 58A, 88A, 107A. The Court ruled Petitioners must make their objections before the jury on a "question-by-question" basis. (CR 1560). App. 20A.

With the jury seated, Respondents' mental suffering trial began. At first opportunity to object to "petitioning" activity as proof of intent to inflict emotional distress, Petitioner's counsel sought a side bar. He sought to keep the letter notifying Respondent of the imminent lawsuit from the jury's consideration in awarding emotional distress damages. That "litigation privilege" objection was overruled, with no limitation. RT 597-598. App. 72A-73A, 110A, 5A, 23A ("suffered adverse evidentiary rulings.")

Appellant next sought to keep the letter notifying Respondent of a proposed amendment to the complaint from the jury's consideration in this emotional distress trial. That "litigation privilege" objection was denied, with no limitation. RT 601-02. App. 74A, 23A ("suffered adverse evidentiary rulings.")

Appellant next sought to keep the 3-day, unlawful detainer notice from the jury's consideration. That "litigation privilege" objection was denied. The evidence went before the jury with the following limitations:

> "[Y]ou can consider whether or not it [the three-day notice] was used *in furtherance of a plan that did not involve litigation.*" RT 610. App. 75A, 24A.

The trial court even allowed the jury to consider "service of" the three -day notice in awarded mental suffering damages:

> "I will allow the jury to consider whether or not the *service of this notice* was pursuant to *an overall objective that was not related to litigation.* RT 610. App. 75, 24A..

Appellant asked the court to keep the "results of" the unlawful detainer action out of the jury's consideration. That "litigation privilege" objection was denied. The evidence went before the jury with the following limitation:

> "You may consider, however, the *results of that action* as bearing upon whether or not the defendants had the *intention of committing or inflicting emotional distress as part of an overall plan.*" RT 614 App. 75A, 24A.

At that point, when the trial court had made it clear that even litigation itself was admissible to show an "overall plan" to inflict emotional distress, the objections ceased. Petitioners did not want to exacerbate the jury's contempt at seeing Appellants try to hide behind a privilege that the Court had ordered did not exist for Petitioners.

E. Federal Issues Raised

(1) "Petition for Grievance"/"Due Process."

Throughout the trial court proceedings Petitioners raised the "litigation privilege." Petitioners' "Answer" raised this defense and asserted "knowing falsity" must be proven. App. 120A, 127A. Petitioners claimed the "litigation privilege" numerous times in their summary judgment motion. App. 7A, 57A, 127A. In their in limine motion, Petitioners asserted "litigation privilege" barred administrative and court proceedings as evidence to

prove this mental suffering case. App. 107A-109A, 20A, 58A. They raise this issue during trial. Quotes *supra* 12-14. California case law holds that the "litigation privilege" is based, in part, on the First Amendment "petition for grievance" clause[13] and as well due process.[14] (Quotes at trial court level at App. 127A-128A.)

The trial court denied all requests that Petitioners' constitution rights under the "petition" and "due process" clauses be protected, with no substantive explanation. Every jury instruction Petitioners offered, including one under *New York Times'* knowing falsity test, were denied, with no explanation. (federal effect explained below). App. 120A.

The Court of Appeal recognizes that Petitioners raised their constitutional right under the "petition" and "due process" clauses. App. 11A, 7A, 17A-20A. (Quotes at appeals court level at App. 128A-129A.)

Though not urged by Respondent, the appellate court reasoned that Petitioners "waived" their constitutional right to keep "petitioning" activity out of the trial. App. 21A-22A. The Slip Opinion finds waiver occurred when Respondents' counsel argued that the jury should determine tort immunity for "petitioning" activity. The Slip Opinion describes the next statement in the appellate record as:

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[13] *California Teachers Ass'n v. State*, 20 Cal. 4th 327 (1999); *Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal. 3d at pages 1130-1137 (1990); *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, 42 Cal. 3d 1157, 1169 (1986); and *Imig v Ferrar* (1977) 70 CA3d 48, 138 Cal Rptr 540; point out that the litigation privilege protects our "constitutional right of access to the courts."

[14] Litigation privilege violations raise constitutional due process issues. *De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates*, 94 Cal. App. 4th 890, 918 (2001); *Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1131 (1990).

> ["The trial court] asked if the Landlords' counsel *had anything to add,* and Petitioner's attorney responded, "No.'" App. 21A.

In truth and fact, the appellate record shows the next statement in the appellate record as:

> *"Anything else you want to add in addition to the Points and Authorities?"* (emphasis added.) Petitioners' attorney responded "no." App. 88A.

The omitted phrase, *"in addition to the Points and Authorities"* refers to Petitioners' in limine motion. The in limine motion raises the "litigation privilege" as a complete bar to Respondents' cross-claim and asks the trial court to stop Respondents from proving his mental suffering case upon "petitioning" activity. App. 58A, 107A-109A. Because "waiver" was raised at the Court of Appeal's own suggestion which did not reveal the misquote, Petitioners were not aware of the Court's err until the Slip Opinion was filed. Petitioners requested rehearing was summarily denied.

The Slip Opinion reasons that Petitioners' above-enumerated constitutional "petitioning" objections had no effect because all this evidence was admitted not as the basis for the claim but to prove the "intent" to inflict emotional distress. App. 19-App.20. Regarding "petitioning" objections with no limiting instruction, the Slip Opinion states only "[Petitioners] suffered adverse evidentiary rulings." App. 23A. Unable to convince the trial court to protect their constitutional rights, Petitioners requested a jury instruction and verdict form, seeking to inform the jury that court and administrative procedures cannot form a basis for Respondents' mental suffering cross-claim. Under these circumstances, the Court of

Appeal found waiver in Petitioners' requested jury instruction and verdict form. App. 21A.

The Court of Appeal determined that non-libelous[15] litigation letters support Respondents' mental suffering cross-claim. (Letters are reprinted at App. 110A-119A. Only individuals to whom the letters are addressed received the letters. Petitioners wrote to Respondents other landowners asking simple questions,[16] which might help them at trial. App. 118A-119A. The trial court had ordered the names of these landowners disclosed to Petitioners in discovery. App. 31A-32A. The appeals court found the non-attorneys liable based on ratification of "litigation." The Slip Opinion found Teresa Fjelline liable, despite any evidence whatsoever that she said or did anything. The Slip Opinion states only that she is a *"co-owner of the property."* App. 28A.

The same First Amendment right to "petition for grievance" and "due process" issues were raised in California Supreme Court Petitions for Review. Citations are at Appendix at 129A-130A. These requests for review were summarily denied.

(2) Federal Supremacy.

Slip Opinion acknowledges USDA federal supremacy arguments were preserved. App. 10A.

Petitioners raised federal USDA Supremacy issues at the trial court level in their Answer (App. 130A) and their in limine motion prior to the contract trial. They asserted federal preemption, frustration of federal purpose, and failure to exhaust federal appeal remedies.

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[15] Respondents' defamation was dismissed on summary judgment.

[16] Contrary to *Steffes v. Stepan Co.* 114 F3d 1070 (1998), the Slip Opinion appears to find basis for liability on this letter.

App. 131A-132A. They raised these issues in pretrial motions. App. 132A-133A. The trial court denied all requests, with no substantive explanation.

Citations on federal issues raised to the Court of Appeal are at 134-135A. The Court of Appeal agreed with the trial court that the federal USDA "in dispute" administrative remedy constituted breach of contract. The Court cited *Romero v. Herpin* (La.App. 1991) 579 So.2d 1218. App. 11A. The Court of Appeal found no conflict with federal law. App. 10A. On request for rehearing, Petitioners pointed out that *Romero* did not involve USDA administrative remedies nor failure to exhaust federal administrative remedies. App. 41A, 44-45A, 103-104A.

Without being urged by Respondents, the Court determined that the jury understood the trial courts' repeated command, that Petitioners had no "right" to use federal procedures, applied only to the contract trial. App 25-26A. On request for rehearing, Petitioners raised the following: (1) the jury was foreign to the contract case, as it did not hear or decide the case, (2) the trial court twice instructed that USDA administrative remedies could show "intent" to inflict emotional distress; (3) and that the Court did not explain its unyielding instruction: "That's the law. That's the law of this case. . . . I want to make sure you're not confused on that issue." App. 120-103A.

The same Federal Supremacy issues were raised in California Supreme Court Petitions for Review. Citations are in the Appendix at 135A. These requests for review were summarily denied.

REASONS FOR GRANTING THE WRIT

A. Instructing the Jury that Petitioners Did not Have the "Right" to Use USDA Procedures Frustrates the Purpose of Federal Law

This Decision addresses questions important to all American farmers. If farmers utilize United States Department of Agriculture "in dispute" petitions, can they trust that they will not be penalized? That is to say, does punishing in contract, tort and punitive damages for petitioning the USDA so frustrate the purpose of farm subsidy law that the Supremacy clause of the Constitution is violated? To make this determination, a short study of relevant farm subsidy law is necessary.

For decades, the USDA has provided regulations on the division of farm subsidies between farm landowner and renter. Federal regulations provide that farm subsidies shall be paid when the parties *agree* on the subsidy division and USDA determines the subsidy division "fair and equitable." In making the "fair and equitable" determination, the USDA is required to study the lease and past history of subsidy division. 7 CFR § 1412.303 App. 122A.

When encountering a dispute on farm subsidy division, the USDA encourages landowner and renter to use a special administrative procedure, an "*in dispute*" petition. When an "in dispute" Decision is requested, the USDA is required to study the farm lease, past history of subsidy division, and other "available evidence." Upon this study, the USDA determines if "*valid dispute*" exists. When the USDA find a "*valid dispute*," subsidies are withheld. The USDA must then give notice of its Decision and give appeal rights, which are to appeal to the USDA Washington D.C. Office. USDA Management Directives 1PF 252. App. 124-126A.

"[A] private remedy should not be implied if it would frustrate the underlying purpose of the legislative scheme." *Cannon v. University of Chicago*, 441 U.S. 677, 703. "To guide the analysis, we generally examine the relevant statute to ensure that we do not fashion the parameters of an implied right in a manner at odds with the statutory structure and purpose. See *Musick v. Peeler*, 508 U.S. at 294-297." *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274 (1998).

A state decision-making tribunal cannot instruct that USDA decision-making tribunal's decision is wrong, as it did here, resulting not only in breach of contract, but tort and even punitive damages. Though the USDA's "in *dispute*" Decision is not a resolution of the dispute, it is a complete statutory scheme. The subsidy payments are not lost but are withheld by the USDA pending the statutorily required "*agreement*" on subsidy division. 7 CFR § 1412.304(b). Appeal rights on the "in dispute" decision are given. Under this statutory scheme, the trial court could not lawfully find that Petitioners' use of USDA administrative was breach of contract. Nor could the trial court repeatedly instruct the jury that Petitioners did not have the "right" to use USDA administrative remedies and "*That's the law. That's the law of this case,*" when the only case before the jury was intentional infliction of emotional distress.

Tragically, this instruction sealed the fate of Petitioners' life savings invested in a farm. The instruction "frustrates the federal scheme" of federal administrative procedures and the farm subsidy law under *Malone v. White Motor Corp.* (1978) 435 U.S. 497, 504 and *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274 (1998). It violates Supremacy clause of the United States Constitution (Art. I § 8), and, as well, the "petition for grievance" Clause.

B. Important Questions were Left Unanswered in *McDonald v. Smith*

Outside the *Noerr-Pennington*, antitrust context, the First Amendment "petition for grievance" clause has engendered little Supreme Court analysis when compared to other First Amendment rights. Two Supreme Court cases (with a span of 140 years between them), *White v. Nicholls* 44 U.S. (3 How.) 266 (1845) and *McDonald v. Smith*, 472 U.S. 479 (1985), hold that the test for tort immunity for writings in First Amendment "petitioning" activity is "knowing falsity."

McDonald v. Smith followed *White*, but it further defined the test for tort immunity in "petitioning" speech, holding the test is the same as that under *New York Times v. Sullivan*, 376 U.S. 254 (1964), "made with knowledge of its falsity or with reckless disregard of whether it was true or false." Yet, *White* and *McDonald* have not settled the diverse decisions in the lower courts on this subject.

Many courts prior to *McDonald* found "petitioning" speech still immune from defamation. Some courts, even after *McDonald*, continued to hold that the "petitioning" speech is immune from defamation lawsuits, often citing *Noerr-Pennington*. *General American Transp. Corp. v. Cryp-Trans, Inc.* 897 F. Supp. 1121 (N.D. Ill. 1995); *Associated Bodywork and Massage Professionals v. American Massage Therapy Ass'n* 897 F. Supp. 116 (N.D.Ill 1995); *Dixon v. Superior Court*, 30 Cal. App. 4th 733.

To confuse the issue even more, the Eighth Circuit interprets *McDonald*'s "knowing falsity" test as applicable to public figures plaintiffs only. *In re IBP Confidential Business Documents*, 800 F.2d 787 (8th Cir. 1986). That is, the Eighth Circuit holds that that there are no additional tort immunities, whatsoever, for speech contained in First Amendment "petition for grievance" activity. Four justices wrote a strong dissent in *IBP*, urging that the

majority misinterpreted *McDonald* and that *McDonald* requires that the *New York Times* test be applied whenever a citizen "petitions for grievance."

In addition to defining the *New York Times* test for tort immunity here, *McDonald v. Smith* determines that absolute immunity does not apply even in non-libel "petitioning" lawsuits. But the question here is: What if falsity is not an element of the tort alleged? What if the lawsuit is, for example, intentional infliction of emotional distress, as in the case at bar?

Many lower courts conclude that various non-libel lawsuits based on First Amendment "petition" speech are immune and cannot stand. For example, in a Third Circuit case, *Brownsville Golden Age Nursing Home Inc. v. Wells*, 839 F.2d 155 (3rd Cir. 1988), allegations of civil conspiracy, interference with business relations, and malicious use of process in instituting administrative proceedings were dismissed as immune under *Noerr-Pennington*. In a Sixth Circuit case, *Eaton v. Newport Board of Education*, 975 F.2d 292 (6th Cir. 1992) allegations of the tort of outrageous conduct for statements at public hearing and in the newspaper were dismissed with a finding that the statements were constituted "classic political speech" protected under *New York Times*. In an Eighth Circuit case, *Missouri* v. *National Org. for Women,*, 620 F 2d 1301, 1317 (8th Cir.), a tort claim for intentional infliction of harm was dismissed under *Noerr-Pennington*. In another Eighth Circuit case, *South Dakota v. Kansas City Southern Industries Inc.*, 880 F.2d 40 (8th Cir. 1989), an interference with contractual relations case was stricken down, citing among other cases *Missouri v. National Org. for Women, Inc.*, 620 F.2d 1301, 1317-19 (8th Cir. 1980). In a Fifth Circuit case, *Feminist Women Health Center, Inc.* v. *Mohammed*, 586 F.2d 530 (5th Cir. 1978),

tortuous interference with contractual relations was dismissed under *Noerr-Pennington*.

Two questions loom from this short discussion on *McDonald v. Smith* and tort immunities for non-libel lawsuits based on First Amendment "petitioning." First, how can *New York Times'* "knowing falsity" test be applied when falsity is not an element of the tort? Second, does *Noerr-Pennington* apply in the non-antitrust context?

C. The Combined Reading of *McDonald v. Smith* and *Hustler v. Falwell* Require Reversal

Hustler v. *Falwell*, 485 U.S. 46 (1988) provides important analysis. In *Hustler* a jury awarded damages for intentional infliction of emotional distress but found defamation not proven. In the case at bar, the Court dismissed defamation, but allowed Respondents' mental suffering cross-claim based upon written "petitioning" activity to proceed. Though *Hustler* is a First Amendment "speech" case, the test for tort immunity in *Hustler* is that under *New York Times* , just as is the test in the case at bar.

Hustler held that the Constitution protects against mental suffering tort claim based on First Amendment speech unless it is knowingly false under *Times*. *Hustler* found:

> "[t]he State's interest in protecting public figures from emotional distress is not sufficient to deny First Amendment protection to speech that . . . is intended to inflict emotional injury when" the speech cannot be interpreted as false.

Respondents cannot pass the *New York Times* test, which was declared the correct test under *McDonald*. In fact, they cannot pass any defamation test because they

failed that test, whether public figure or private person, when their defamation action was found meritless.

The judgment in the case at bar violates the rule in *Hustler*. Our laws will not allow mental suffering damages based on litigation speech, which is not "knowingly false." The judgment in this case violates the interpretation of our United States Constitution as announced in *McDonald* and *Hustler*. Respondents could not prove the statements in litigation were "knowingly false."

Petitioners pray that this judgment be returned to the Court of Appeal to consider the combined effect of the United States Supreme Court cases, *McDonald v. Smith*, 472 U.S. 479 (1985) and *Hustler* v. *Falwell*, 485 U.S. 46 (1988).

D. The Courts are in Disarray about *Noerr-Pennington*'s Application in Contexts Other Than Antitrust

Perhaps the *Noerr-Pennington* rule is so familiar that background is unnecessary, yet a few lines of description are provided. The *Noerr-Pennington* rule generally holds that political, administrative and executive "petitioning" cannot evidence antitrust violations, as this would violate First Amendment rights of association and petition. *Eastern R. Presidents Conference v. Noerr-Pennington Motor Freight, Inc.* (1961) 365 U.S. 127 and *United Mine Workers v. Pennington* (1965) 381, U.S. 657. The *Noerr-Pennington* rule was later extended to include First Amendments "petitions for grievance" to administrative agencies and courts, at least in the antitrust context. *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972).

An exception to *Noerr-Pennington* immunity developed. This exception was that "sham" petitioning did not come under *Noerr-Pennington* protection. "Sham"

petitioning is objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits. If, and only if this test is passed, can the litigants' subjective motives be tested. *Professional Real Estate Investors v. Columbia Pictures Industries ("PRE")*, 508 U.S. 49 (1993).

As shown above, many cases analyze judicial dispute resolution under the *Noerr-Pennington* rule though the suit does not involve antitrust issues. Some respected legal commentators argue that *Noerr-Pennington* does not apply outside antitrust area. "The Misapplication of the *Noerr-Pennington* Doctrine in Non-antitrust Right to Petition Cases" 36 Stanford Law Review 1243, 1253 (1984). Other respected commentators argue that *Noerr-Pennington* must apply to all citizens, whether involved the antitrust context or otherwise. "Protecting the First Amendment Right to Petition: Immunity For Defendants in Defamation Actions Through Application of the Noerr-Pennington Doctrine" The American University Law Review 31:147, 163-171 (1981).

In most jurisdictions, *Noerr-Pennington* is being applied equally, whether the lawsuit involves antitrust issues or other issues. But the Supreme Court has yet to speak, leaving a few courts to interpret the important issue of whether the rules protecting First Amendment "petitioning," as carved out under *Noerr-Pennington,* must be passed whenever First Amendment "petition for grievance" is invoked. Many court have commented on the disarray among the lower courts.

In re American Continental Corporation/Lincoln Savings & Loan Securities Litigation Lexecon, 102 F.3d 1524 (9th Cir. 1996) states:

> "There is now extensive case law on both sides of the question whether the *Noerr-Pennington* doctrine brings first amendment principles to bear on state law tort

> claims." citing *State of South Dakota v. Kansas City Southern Indus.*, 880 F.2d 40, 50-51 (8th Cir. 1989); *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 159-60 (3d Cir. 1988); *Havoco of Am., Ltd. v. Hollobow*, 702 F.2d 643, 649 (7th Cir. 1983; *Sierra Club v. Butz*, 349 F. Supp. 934, 938-39 (N.D. Cal. 1972); *Florida Fern Growers, Inc. v. Concerned Citizens of Putnam County*, 616 So. 2d 562, 569 (Fla. 1993).

The Ninth circuit noted that the application of *Noerr-Pennington* to state law claims has been unpredictable. For example, the PRE objective baselessness standard was not applied in a libel suit. PRE was said not to be on point. *Diamond Walnut Growers, Inc. v. NLRB*, 53 F.3d 1085, 1087-88 (9th Cir. 1995). But a timber company counterclaim against an environmental organization for abuse of process, based on that organization's efforts to enjoin logging on the timber company's land, was required to meet the heightened pleading standard associated with *Noerr-Pennington* . *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531, 533-35 (9th Cir. 1991).

Herr v. Pequea Township, 274 F.3d 109 (3d Cir. 2001), notes that many jurisdictions apply *Noerr-Pennington* to state tort claims, but there is no Supreme Court rule:

> "Since *PRE*, the courts of appeals have frequently held that the restrictions on liability under *Noerr-Pennington* are applicable to liability under state tort laws." citing *State of Missouri v. National Organization of Women*, 620 F.2d 1301, 1318-19 (8th Cir. 1980); *Video Intern Productions, Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1084 (5th Cir. 1988); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 614-15 (8th Cir. 1980); *Stern v. United States Gypsum, Inc.*, 547 F.2d 1329, 1342-46 (7th Cir. 1977)."

The question about *Noerr-Pennington,* which this case raises is common to many other cases. That question involves whether or not *Noerr-Pennington's* "sham" test must be applied. Had the *Noerr-Pennington's* "sham" test been applied when Petitioners requested in limine and in summary judgment that Respondent be barred for proving his mental suffering case upon "petitioning" activity, Respondent couldn't have proven his case. The United States government rendered a Decision that Petitioners had a "valid dispute," and, thus, farm subsidy payments would be withheld. This "valid dispute" Decision severs the lifeline of Respondents' mental suffering action because Respondents' mental suffering cross-claim is inextricably tied to the dispute over USDA farm subsidies.

As shown above, Respondents' counsel argued throughout trial that *"stop[ping] the [subsidy] payment"* showed an *"intent to impose mental suffering." supra* 7-8 On receiving the USDA decision "valid dispute" Decision, Petitioners sought the return of their land, which Respondent would not farm, in an unlawful detainer action. Over objection, the Court allowed the 3-day unlawful detainer notice, service of the notice and even the results of the action into evidence to show an "intention of committing or inflicting emotional distress as part of an *overall plan.*" This evidence should not have been admitted because Petitioners' dispute over subsidy division was "valid." The dispute was not a "sham," as it was held to be exactly the opposite by the United States Department of Agriculture.

On these facts, Petitioners pray that Writ of Certiorari issue to determine the application of *Noerr-Pennington's* "sham" test in non-antitrust "petition for grievance" activities.

E. Waiver of a Constitutional Right Cannot be Based on a Misquote of the Appellate Record, Leaving Out Words of Objection

The Slip Opinion (without Respondents' urging) found Petitioners waived their constitutional right to keep "petition for grievance" activities out of the trial. The Slip Opinion found waiver in Petitioners' counsel's response, "no." But the Slip Opinion fatally misquotes the question preceding the "no" response, though the correct quote is printed in the appellate transcript. By that misquote, the Slip Opinion omits the very objection, which halts any finding of waiver of First Amendment "petition" rights.

The statements at trial upon which the Slip Opinion finds waiver are as follows. Respondents' counsel suggested that all litigation procedures should be presented at the mental suffering trial for the jury's determination as to what is protected and what is not. The Court of Appeal states the following came next:

> "[the trial court] asked if the Landlords' counsel *had anything to add.* Petitioners' counsel: "no." App. 21A.

In truth and fact, as the appellate transcript shows, the following came next:

> Trial Court: *"Anything else you want to add in addition to the Points and Authorities?"* App 88A.
>
> Petitioners' counsel: "no."

The Slip Opinion omits the phrase *"in addition to the Points and Authorities."* The "Points and Authorities" clearly state Petitioners' objections. The Slip Opinion's omission renders a completely different meaning. With the phrase, the meaning is: "no, I'll stand by the requests in my points and authorities." Court

Record ("CR") 1501-1503. Petitioners ask in the "points and authorities" that Respondents be stopped from proving their mental suffering cross-claim based on constitutionally-protected dispute resolution procedures. ("Points and authorities" reprinted at App. 107A; transcript quoted in summarily denied Petition for Rehearing. App. 88A)

With the phrase, "*in addition to your points and authorities,*" as in fact was in the printed appellate transcript, waiver cannot be found. [17] The misquote turns the meaning of the "no" response up side down.

Petitioner believes a host of problems arose because of this misquote. Instead of documenting Petitioners' objections at trial, the Slip Opinion states that Petitioners "suffered adverse evidentiary rulings." It neglects to document that Respondent was allowed to present as outrageous conduct serving legal papers, sending out interrogatories, giving notice of a lawsuit, corresponding with witnesses whose names the Court had ordered disclosed, and undertaking federal administrative remedies. The Slip Opinion neglects, perhaps due to the finding of waiver, to quote the trial court's repeated instructions to the jury that Petitioners' did not have the "right" to use United States Department of Agriculture administrative remedies and "that's the law of this case" and "I want to make sure you're not confused on that issue."

Due process requires that the courts indulge every reasonable presumption against waiver, and they should

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[17] Petitioners were not even aware, nor did they have reason to be aware, that the Court of Appeal was analyzing waiver based on error until the Slip Opinion was issued with the misquote was revealed. Petitioners sought rehearing, preserving this issue for later appeal. Rehearing was summarily denied.

not presume acquiescence in the loss of a fundamental right. *Barker v. Wingo*, 407 U.S. 514 (1972). Waiver of a constitutional right must be voluntary. *Perez v. Brownell*, 356 U.S. 44 (1957).

Petitioners pray that the case be returned to the Court of Appeal to correct this err, as it resulted in a finding of waiver of Petitioners' fundamental constitutional right to be free of lawsuits based on First Amendment "petitioning," and that the Court of Appeal be required to consider waiver of Petitioners' constitutional "petition" and "due process" rights based upon the actual words contained in the appellate record.

CONCLUSION

Without question, Petitioners had every "right" to use United States Department of Agriculture administrative procedures. The Supremacy Clause was violated by this instruction. And Petitioners had every right to enter the courthouse doors seeking to resolve their farmland dispute before the Courts. Serving required legal notices, writing attorney letters to opposing counsel in pending litigation, requiring that interrogatories be answered, asking simple "questions" of prospective witnesses whose names were disclosed in discovery, and filing a lawsuit is not outrageous nor is it despicable This system is not evil and it is not a "Saddam Hussein" tactic, as Respondent asserted. App 6A. This is our dispute resolution system in United States of America, a system we inherited from England, a system designed to prevent justice by the biggest gun.

Engaging in litigation and hammering out the laws of our nation is not "polite." Instead, it is sometimes tedious, sometimes aggravating, sometimes frustrating

and always fraught with never-ending, backbreaking conflict. But the laws, which result, are the backbone of our nation. The ability to vigorously pursue our rights should not impinged, and always second-guessed. As *Briscoe v. LaHue (1983)* 103 S. Ct. 1108 states: "the paths which lead to the ascertainment of truth should be left as free and unobstructed as possible."

Petitioners pray that Writ of Certiorari issue to review the effect of the trial court's mandate that Petitioners had no "right" to pursue USDA remedies and to settle the law amongst the jurisdictions on tort immunities under our First Amendment "petition for grievance" clause and the "due process" clauses. Alternatively, Petitioners respectfully pray that this case be returned to the California Court of Appeal Third Appellate District for further proceedings regarding waiver under the actual statement made instead of the erroneously quoted question, to consider the case in light of *Professional Real Estate Investors v. Columbia Pictures Industries ("PRE")*, 508 U.S. 49 (1993), and to consider the case in light of the combined effect of *Hustler* v. *Falwell*, 485 U.S. 46 (1988) and *McDonald v. Smith*, 472 U.S. 479 (1985). Petitioners pray that their constitutional right to "petition for grievance" not be impinged.

Respectfully submitted,

/s/ Linda Foster

Linda Foster

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID P. FJELLINE, et al.,

Petitioners,

versus

JOHN N. GRECO, et al.,

Respondents.

On Petition for Writ of Certiorari to Court of Appeal of the State of California Third Appellate District

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APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A
Court of Appeal Slip Opinion
Rule (i)(i)

FILED
Court of Appeal Third District
California Court of Appeal
Third Appellate District
MAY 8 2002

NOT TO BE PUBLISHED
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

DAVID P. FJELLINE et al., *Plaintiffs, Cross-defendants, and Appellants,* v. JOHN N. GRECO et al., *Defendants, Cross-complainants, and Respondents.*	C035835 (Super.Ct.No. SCV 6972)

In this case, a lease dispute between plaintiffs and cross-defendants David P. Fjelline, Teresa Fjelline, Guy William (Bill) Foster, and Linda Foster (collectively, the Landlords), and defendants and cross-complainants John Nick Greco and Lorraine Greco (the Tenants), over division of a $16,480 federal rice subsidy escalated to include tort claims, and resulted in judgment against the Landlords for $283,029.50 plus costs.

On appeal from the order denying their motion for judgment notwithstanding the verdict and the judgment, the

Landlords argue: (1) as a matter of federal law, they did not breach the crop share lease; (2) binding them to custom and usage based on superseded federal law was reversible error; (3) the award of lost profits was excessive as a matter of law; (4) the court should have dismissed the cross-complaint for intentional infliction of emotional distress; and (5) the damage award was excessive. We affirm the judgment with modifications.

FACTUAL AND PROCEDURAL BACKGROUND

In the fall of 1997, 87-year-old Louise Surmon contacted real estate agent John Holland about selling her 156-acre farm in Lincoln. The farm had 97.3 acres of rice base eligible for federal support payments. Surmon, who lived in Southern California, relied on her former tenant, Wilmot Brown, to take care of matters in Lincoln. Brown suggested Nick Greco might be interested in farming the property while Surmon waited for a buyer.

Greco has a masters degree in agricultural science. At the time of trial, he leased land and grew rice on about 10 farms in the Lincoln area. Greco tried to tailor his acreage to maximize his share of rice subsidies, and his efforts were successful between 1994 and 1998. Greco was also a long-time board member of the Farm Services Agency (FSA) in Auburn.

Surmon and Greco executed a three-year lease of 97.3 acres on November 18, 1997. The lease gave Surmon 20 percent of the "gross proceeds from all crops grown." Greco did not tell Surmon or Holland that under the 1996 farm bill, Surmon was entitled to receive the federal subsidy on the 97.3 acres upon expiration of the prior lease with Brown.[1]

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[1] "The Federal Agriculture Improvement and Reform Act of 1996 (1996 Act) provides producers on farms with 1996 . . . rice crop acreage the opportunity to enter into Production Flexibility Contracts with the Commodity Credit Corporation (CCC) for the years 1996 through 2002." (7 C.F.R. § 1412.101 (2001).) The regulations state that "[a] landowner

The Landlords expressed interest in buying Surmon's property with no more than a one-year lease. They were not farmers, but wanted to own farmland. Dave Fjelline was a wildlife specialist for Placer County who had lived in Lincoln for 49 years. Bill Foster was co-owner of an auto parts business. Linda Foster was a licensed attorney who worked as an accountant.

Greco agreed to a one-year lease on the condition his share be increased from 80 to 90 percent. Holland told Dave Fjelline that the Landlords would receive about $6,000 a year in income from a three-year lease, and Fjelline assumed a one-year lease would generate $3,000. On or about December 1, 1997, Surmon executed a one-year lease with Greco. The new lease, which is the subject of this lawsuit, provided: "The lessor shall recieve [sic] 10% of the gross procedes [sic] from all crops grown on the land . . . ." The Landlords purchased the Surmon property on December 30, 1997. At that time, they were unaware the land was eligible for federal subsidies.

Dave Fjelline and Bill Foster went to the FSA office in Auburn on January 8, 1998, and learned for the first time that their property was eligible for over $16,000 in rice subsidies. On that date, Yarda Hansen of the FSA had Fjelline and Foster sign a production flexibility contract (PFC) which gave them 100 percent of the federal funds.

The parties disagree on what occurred at the first meeting between Dave Fjelline and Nick Greco at Lupita's Restaurant in Lincoln on January 14, 1998. Fjelline testified he planned to discuss how they were going to work together. He raised division of the crop subsidy, and Greco said it was already covered under the lease provision that referred to gross proceeds. When Greco informed Fjelline he intended to farm only half of the leased acreage, Fjelline asked him to farm all of it. Greco insisted there was insufficient water to grow rice on the entire 97.3 acres, and

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may receive up to 100 percent of the contract payment if no lease exists with respect to the contract acreage." (7 C.F.R. § 1412.303(b)(1) (2001).)

advised Fjelline to see his attorney if he wanted anything changed. Greco testified that Fjelline wanted the entire crop subsidy, and told him to get off the property. According to Greco, Fjelline demanded he cooperate, or "we're going to get you."

Fjelline approached Greco again the following morning at Wilmot Brown's house, and talked about a buy-out. Greco became agitated, but eventually agreed to come up with a price. He suggested that Fjelline get back to him in a couple of weeks. Greco believed Fjelline was stalking him by stopping at Brown's house.

Meanwhile, Hansen telephoned Bill Foster on January 14, and told him the Landlords would have to sign a new PFC based on the lease terms. The two men went to the FSA office on January 15. The staff informed them that the property owners were not entitled to receive 100 percent of the subsidy under the regulations. Moreover, if they failed to sign the new PFC that day, Greco would receive no money for spring planting. Fjelline and Foster signed the new PFC under protest, based on the 90/10 percent split of gross proceeds set forth in the lease.[2]

Dave Fjelline discussed the proposed buy-out with the Tenants on February 14, 1998. He suggested that the Tenants calculate their labor and other costs, and "they would tack on a thousand for their trouble and that [the Landlords] would pay them for that and be done." Lorraine Greco gave Fjelline the utility bills to pay, believing that an agreement was near.

Anticipating a declaratory relief action, Linda Foster wrote to Nick Greco on March 3, 1998, as the representative of "Guy W. Foster, [herself], David Fjelline and Theresa Fjelline . . . ." She described what she viewed as areas of

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[2] The Tenants repeatedly state on appeal that Dave Fjelline and Bill Foster signed the January 15, 1998 PFC under penalty of perjury. However, the admonition regarding fraudulent representations did not appear on the PFC itself, but on page four of an appendix to the PFC. Fjelline and Foster testified they did not receive a copy of the appendix when they signed the PFC on January 15, 1998.

uncertainty in the lease. Commenting on custom and trade usage with regard to providing for division of rice subsidies in the lease, Foster stated: "... Farm Services Agency has provided us with a sample lease agreement, and that lease agreement contains explicit provisions regarding government program payments. I understand that you are on an advisory committee which reviews farm leases and advises regarding the fairness of such leases. As such, you more than almost anyone else know that prudence would dictated [sic] that government program payments be provided for in the lease. We believe that you used that knowledge to take advantage of our predecessor, Mrs. Surmon, an 83 year old widow." While assuring the Tenants she and her clients were not attempting to rescind or repudiate the lease, she stated: "What we intend to do is to institute an action against you to obtain a determination of the Court as to who gets the government program payments and who has rights to the water. If we win, we will enforce our judgment against your assets."

The Tenants retained an attorney who suggested Linda Foster contact Verna Gordon and David Shat at the FSA in Sacramento to confirm that the subsidy split was the same as the crop split. Gordon, a 28-year employee of the Department of Agriculture, told Bill Foster that he could sign a PFC with disputed shares. She explained such action would tie up the advance payment, but was appropriate if the lease did not provide for division. Gordon learned that the Landlords had not been advised of their right to put the shares in dispute. She faxed Foster a copy of the relevant regulations.

Linda Foster wrote the Tenants' attorney on March 11, 1998, about the information received from Shat and Gordon. She confirmed the Landlords intended to file the action for declaratory relief, but stated the $4,000 settlement offer remained open. The complaint, filed the same day on behalf of the Fjellines and Fosters, sought a declaration by the court that the lease was unenforceable due to uncertainty, or, in the alternative, the court's interpretation

of the lease with regard to division of the rice subsidy, rights to the well water, and the Tenants' obligation to farm all of the land they leased.

Meanwhile, a follow-up letter from the FSA office in Auburn on March 20, 1998, informed the parties: "According to information provided by our state office you may dispute the shares in your contract as the lease does not stipulate how the PFC payments will be distributed. Because the shares are now in dispute, please be advised no further payments will be issued until the dispute is settled. The County Committee may not settle division of payment disputes; however, they may assist by providing suggestions. Let me reiterate, if the dispute is not settled, further payments will not be issued." Bill Foster filed the paperwork necessary to initiate the administrative proceedings. The Placer-Nevada-El Dorado Area FSA committee set a hearing on the dispute on April 8, 1998. It ultimately recommended that the parties split the payment 90/10 on the planted acres, and 50/50 on the unplanted acres.

By letter dated March 27, 1998, counsel for the Tenants informed the Landlords they planned to file a cross-complaint seeking general and punitive damages based on "a series of acts which were designed to deny the existence of a contract and to bludgeon the [Tenants] by embarrassment and threats into foregoing the benefits of the lease . . . ." Counsel observed that "[i]t seems unlikely that an American jury in Auburn, California is going to appreciate this example of the Saddam Hussein School of Negotiations, and I particularly must say that it is my duty as an attorney to make sure that you never attempt this type of behavior on any other individuals." He continued, "These are exactly the type of cases which we find most rewarding. A member of our firm was named 'Trial Lawyer of the Year' a decade ago for pursuing cases of this nature through the Supreme Court, . . ."

The Tenants' cross-complaint, filed April 22, 1998, alleged breach of contract, defamation, and intentional

infliction of emotional distress. The Landlords answered, asserting, among other defenses, that the alleged wrongful conduct was absolutely privileged.

On April 22, 1998, the Landlords filed a separate action for unlawful detainer. (Fjelline v. Greco (Super. & Mun. Cts., Placer County, 1998, No. MCV 4146).) The complaint alleged the Tenants had agreed to cancel the lease, but refused to farm or return possession of the property. The court ruled on May 14, 1998, that the Landlords take nothing because the same dispute was the subject of the pending action for declaratory relief.

On May 13, 1998, the Landlords filed a first amended complaint which added causes of action for breach of agreement to rescind the lease, and constructive fraud.

Meanwhile, Nick Greco planted nothing. He testified at trial that he was prevented from planting by the rains, the litigation, and the threat to his contract payment income. The Tenants claimed and ultimately received crop insurance proceeds in the amount of $8,612, due to rainy conditions.

Linda Foster wrote the Tenants on September 5, 1998. The letter included the following language: "At trial Mr. Greco's business practices will be fully exposed. Mr. Greco is already known as a hot-headed, hard to deal with individual. If Mr. Greco intends to stay in business, he needs to give some serious thought to how this lawsuit is further damaging his reputation in the community. If Mr. Greco loses the lawsuit (or even if he wins), he may find few, if any, landowners who will give him the opportunity to farm."

In November 1998, the Landlords moved for summary adjudication of the Tenants' causes of action for defamation and intentional infliction of emotional distress. They cited the litigation privilege (Civ. Code, § 47, subd. (b)), and lack of evidence of publication in support of their motion. The court granted summary adjudication on the defamation claim, finding no evidence of defamatory statements made by the Landlords. It also ruled that there remained triable issues of fact with respect to the claim for